

## ISSUES AND OPTIONS WORK SHEET

### *Issue Description: Interest rates for late payments*

Confusing, conflicting statutory language exists regarding the interest rate that may be charged if the State is late in making a contract payment. One section implies an interest rate of 10% per year, the other a rate of .05% per day (18.25% per year).

### *Issue Source*

Sections 18-1-404, MCA, (10% annually) and 17-8-242, MCA, (0.05% daily) may conflict.

### *Options*

1. Amend the law to more clearly specify the applicable rate of interest and time at which interest payments begin to accrue on contract obligations of the state.
2. Leave current law as is.

### *Recommended Option*

The Department of Administration recommends preliminary adoption of Option 1 to eliminate confusion in the future.

Advantages
< Would minimize or eliminate confusion
< Could enhance efficiency

Disadvantages
< none foreseen
< could be more expensive to state

### *Committee Action*

- \_\_\_\_\_ Prepare draft legislation to clarify whether the 10% annual rate or the 0.05% daily rate applies (Option 1)
- \_\_\_\_\_ Prepare draft legislation to clarify that a different, but specific rate applies.
- \_\_\_\_\_ Recommend the status quo
- \_\_\_\_\_ Other

*Discussion:* \_\_\_\_\_

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## ISSUES AND OPTIONS WORK SHEET

### ***Issue Description: No Cost Procurements***

The Montana Procurement Act applies to the "expenditure of public funds". It is not clear, however, what applies when "public funds" are not being expended, but a profit is being made by a vendor on the activity or transaction with the State. Examples: the placement of ATM machines in State buildings; a cafeteria getting space in a State building; or an energy consultant paid out of energy savings.

***Issue Source*** Section 18-4-132, MCA, describes the general application of the Montana Procurement Act.

### ***Options***

Two basic options are available to the Legislature to address this issue. The options include:

1. Statutorily clarify that the Procurement Act applies to a procurement when "public funds" are not expended.
2. Leave statutory language as is.

### ***Recommended Option***

The Department of Administration recommends preliminary adoption of Option 1. The recommendation is predicated on the belief that the public interest will be enhanced by providing clearer legislative guidance on no cost procurements.

Advantages
< Would minimize or eliminate confusion
< Could enhance efficiency or reduce cost

Disadvantages
< none foreseen
<

### ***Committee Action***

- \_\_\_\_\_ Prepare draft legislation to clarify that the Act applies for the expenditure of "public funds" only (Option 1)
- \_\_\_\_\_ Recommend the status quo
- \_\_\_\_\_ Other

***Discussion:*** \_\_\_\_\_

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## ISSUES AND OPTIONS WORK SHEET

### *Issue Description: Distribution of Grant Funds*

Statutory language is unclear as to how the distribution of grant monies should be handled if the funds are distributed to sources other than other governments or if the funds come from non-federal sources. Should the distribution of these funds be covered by the Montana Procurement Act?

### *Issue Source*

Section 18-4-132, MCA, describes the applicability of the Montana Procurement Act.

### *Options*

1. Generally clarify the language regarding the use of grant money and competitive procurements.
2. Specifically identify the methods and the circumstances under which special considerations apply regarding grant money and competitive procurement.
3. Leave current statutory language as is.

### *Recommended Option*

The Department of Administration recommends preliminary adoption of Option 1. The recommendation is predicated on the belief that clarification is necessary if the Department is to be able to follow the legislature's intent as articulated in statute.

Advantages
< Legislative policy regarding grants and competitive procurement can be followed more easily

Disadvantages
< none foreseen <

### *Committee Action*

- \_\_\_\_\_ Prepare draft legislation to implement the recommended revisions to the protest process; estimate costs (Option 1)
- \_\_\_\_\_ Prepare draft legislation describing the methods and the circumstances under which special considerations apply (Option 2)
- \_\_\_\_\_ Recommend the status quo
- \_\_\_\_\_ Other

*Discussion:* \_\_\_\_\_  
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## ISSUES AND OPTIONS WORK SHEET

### ***Issue Description: Application of Montana Procurement Act***

Due to unclear statutory language, it is unclear if the Montana Procurement Act applies to purchases made by certain programs. For instance, the Department of Corrections may enter into contracts for the confinement of prisoners, but it is not clear whether or not those contracts are covered by the Act.

***Issue Source*** Title 18, chapter 4, MCA, and other provisions of the MCA.

***Options*** A range of options is available to the Legislature to address the issue of the applicability of the Procurement Act. The options include:

1. Identify each statutory provision related to state contracting and assess whether there is conflict with the Procurement Act. Wherever conflict exists, clarify if the Act applies or if the specific non-Procurement Act provision(s) should stand alone.
2. Revise the Procurement Act to more firmly and formally assert its general primacy for all state contracts.
3. Revise the Procurement Act to limit its applicability, thereby allowing non-Procurement Act contracting provisions to apply in individual cases.
4. Leave existing statutory language as is.

### ***Recommended Option***

The Department of Administration recommends preliminary adoption of Option 1. The recommendation is predicated on the belief that the Montana Procurement Act is basically sound in substance and application, but that existing conflicts, whether real or apparent, should be assessed on a case-by-case basis and that clarification should be made wherever appropriate.

Advantages
< Would minimize or eliminate confusion
< Could enhance efficiency

Disadvantages
< none foreseen
<

### ***Committee Action***

- \_\_\_\_\_ Prepare draft legislation to clarify where the Act applies and doesn't apply (Option 1)
- \_\_\_\_\_ Prepare draft legislation clarifying that the Act applies absent a specific exception (Option 2)
- \_\_\_\_\_ Prepare draft legislation to clarify that language specific to individual procurement authority prevails over the general language of the Act (Option 3)
- \_\_\_\_\_ Recommend the status quo

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\_\_\_\_\_ Other

*Discussion:* \_\_\_\_\_

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## ISSUES AND OPTIONS WORK SHEET

### *Issue Description: Contracting with Former or Current State Employees*

Confusion exists as to the award of certain contracts whenever a former or current state employee may be involved in the contract. Case law may protect the rights of former or current employees to contract with the State.

**Issue Source** Section 2-2-201, et seq., MCA, addresses prohibited acts related to contracts. Section 2-2-105, MCA addresses contracting with former state employees.

### *Options*

A range of options is available to the Legislature to address the issue of the award of a contract to a former state employee. The options include:

1. Amend the law to: clarify situations in which a former or current employee may contract with the state, ensure the rights of former and current employees; and protect the best interest of the state.
2. Eliminate restrictions on contracting between the state and former or current employees of the state.
3. Leave statutory language as is.

### *Recommended Option*

The Department of Administration recommends preliminary adoption of Option 1. Several sections of law are conflicting or unclear regarding when current or former state employees may enter into state contracts, leaving the Department with unclear guidance in how to apply the law.

Advantages
< Increasing clarity of purpose and legality of statutes is in the state's best interest
< Could enhance efficiency or reduce cost

Disadvantages
< none foreseen
< could lead to public perception of insider deals

### *Committee Action*

- \_\_\_\_\_ Prepare draft legislation to clarify the conditions under which the State and a current or former employee may contract. (Option 1)
- \_\_\_\_\_ Prepare draft legislation to eliminate restrictions on contracting with state employees. (Option 2)
- \_\_\_\_\_ Recommend the status quo
- \_\_\_\_\_ Other

*Discussion:* \_\_\_\_\_

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## ISSUES AND OPTIONS WORK SHEET

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### *Issue Description: Procurement Protests*

State law allows a bidder or offeror to protest the solicitation or award of a state contract. Responding to frivolous protests can be extremely time-consuming and costly for the State. In contrast, the private sector has no tradition of entertaining protests from unsuccessful vendors. Some states have adopted laws that eliminate the administrative protest process, thus requiring an aggrieved offeror to go right to court.

### **Issue Source**

Section 18-4-242, MCA, provides for a three-step protest process for bidders or offerors in connection with the solicitation or award of a contract. In addition, funding to handle protests was not sought at the time the protest process was adopted in 1997, nor was funding requested in 1999.

### **Options**

A range of options is available to the Legislature to address the issue of protests. The options include:

1. Eliminate the contested case hearing step in the current three-step protest process established in 18-4-242, MCA. In this case, the bidder or offeror could still file a protest -- to be answered by the department -- but if the protest is not resolved to the protester's satisfaction, then the protester's next step would be to pursue court action.
2. Legislatively recognize the direct and indirect costs of protests by providing necessary and sufficient personnel and financial resources for responding to the protests.
3. Require a protester to bear some cost for making a protest by requiring a deposit (\_\_\_% of the contract award) be placed with the State as a condition of requesting a contested case hearing; if the vendor loses the protest, the State's actual costs of responding to the contested case hearing or court action, would be deducted from the deposit.
4. Adopt the private sector practice of not permitting any protests, therefore forcing vendors to go directly to court to lodge a complaint against the State.

### **Recommended Option**

The Department of Administration recommends adoption of Option 1 anticipating that it would slow the "winners win and losers sue" trend. In addition, the Department also recommends Option 2 in order to have resources to respond to the protests that will inevitably occur.

Advantages
< May reduce the number of frivolous protests coming into the department

Disadvantages
< Removes an avenue for vendors for pursuing protest resolution
< May not reduce cost



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< May reduce cost

<

### Committee Action:

- \_\_\_\_\_ Request draft legislation implementing Department recommendation
- \_\_\_\_\_ Request draft legislation establishing a financial commitment by protester (Option 3)
- \_\_\_\_\_ Request draft legislation eliminating protests (Option 4)
- \_\_\_\_\_ Recommend the status quo
- \_\_\_\_\_ Other

*Discussion:* \_\_\_\_\_

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## ISSUES AND OPTIONS WORK SHEET

### *Issue Description: Outreach to the Business Community*

The procurement process is becoming increasingly complex. Many businesses are not aware of how to do business with the State or do not understand the State's approach to solicitation and contract awards. Further, transactions between the State and veteran vendors can always be improved.

**Issue Source:** Current funding is inadequate to expand efforts by the State to reach out to the business community in terms of training opportunities. Currently the State Procurement Bureau publishes a "Vendor Handbook", which is available electronically or in hard copy but, due to resource limitations, does little else in terms of outreach.

### *Options*

1. Recommend, through legislation, additional resources to provide education efforts in the form of regional training classes for Montana businesses.
2. Recommend the status quo
3. Recommend, through legislation, a reduction in resources to result in reduced efforts to inform and educate Montana businesses.

**Recommended Option:** The Department of Administration recommends Option 1.

Advantages
< Should make more businesses aware of how to do business with the State
< May increase the number of State contracts with in-state businesses
< May decrease number of protests

Disadvantages
< There will be additional cost
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### *Committee Action*

- \_\_\_\_\_ Prepare detailed program outline, including cost estimate
- \_\_\_\_\_ Recommend the status quo
- \_\_\_\_\_ Recommend changes to reduce resources below status quo
- \_\_\_\_\_ Other

*Discussion:* \_\_\_\_\_

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## ISSUES AND OPTIONS WORK SHEET

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## ISSUES AND OPTIONS WORK SHEET

### ***Issue Description: Certification of State Procurement Officials and Targeted Training of Contract Administrators***

Procurement is becoming increasingly complex. The nature, scope, size, visibility, and risk of procurements are also increasing. Procurement officials and contract administrators need on-going thorough training to ensure the state's best interests by producing and monitoring effective contracts.

***Issue Source:*** Current funding is insufficient to provide specific procurement and contract training.

### ***Options***

A range of options is available to address training for procurement officials and contract monitors.

1. Require all or some State procurement officials to obtain a national procurement certification. This option is to establish certification as a requisite for new employees, base an agency's procurement delegation authority on the level of certified procurement officials in the agency, or both. Develop and deliver targeted training for contract administrators on an on-going basis.
2. Initiate a State directed procurement certification process. State-specific training courses would be developed and delivered, and a certification program managed. State procurement officials and contract administrators would be required to attend.
3. Continue the status quo

### ***Recommended Option***

The Department of Administration recommends preliminary adoption of Option 1 or 2. The recommendation is predicated on the belief that the quality of solicitations, contracts, and performance on contracts would improve.

Advantages
< Promotes a well-qualified work force
< May reduce liability for errant contracts or procurements

Disadvantages
< There will be additional cost
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### ***Committee Action***

- \_\_\_\_\_ Prepare detailed program outline, including cost estimate
- \_\_\_\_\_ Recommend the status quo
- \_\_\_\_\_ Recommend changes to reduce resources below status quo
- \_\_\_\_\_ Other

***Discussion:*** \_\_\_\_\_

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## ISSUES AND OPTIONS WORK SHEET

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## ISSUES AND OPTIONS WORK SHEET

### *Issue Description: Additional Procurement Staff*

Burgeoning workload has been a trend in the State Procurement Bureau for several years. Additional people are needed to manage the workload. Over the years, staffing in the Bureau has dropped from 12 FTE to 8 FTE. However, the complexity of the work has increased over that same time, forcing the Bureau staff to manage workloads that are unrealistic and that threaten the quality of their work products.

**Issue Source:** Current funding is insufficient to provide necessary and sufficient staff for the State Procurement Bureau.

### *Options*

1. Recommend, through legislation, additional resources to provide additional resources to meet growing workload demands.
2. Recommend the status quo
3. Recommend, through legislation, a reduction in resources to promote greater efficiency within the Bureau

### *Recommended Option*

The Department of Administration recommends preliminary adoption of Option 1. The recommendation is predicated on the belief that providing for necessary and sufficient staff will improve procurements.

Advantages
< Should improve overall procurement process
< Should educe amount of overtime paid out and comp time accrued

Disadvantages
< There will be additional cost
<
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### *Committee Action*

- \_\_\_\_\_ Prepare detailed program outline, including cost estimate
- \_\_\_\_\_ Recommend the status quo
- \_\_\_\_\_ Recommend changes to reduce resources below status quo
- \_\_\_\_\_ Other

*Discussion* \_\_\_\_\_

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## ISSUES AND OPTIONS WORK SHEET

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## ISSUES AND OPTIONS WORK SHEET

### *Issue Description: Contract preferences*

State law provides a contract preference to Montana residents and for Montana-made products. There is some evidence that preferences may actually harm the Montana businesses that are trying to conduct business in other states. In addition, state procurement staff have observed that the statutory preferences rarely assist Montana businesses in obtaining contracts from the State.

**Issue Source:** Parts of 18-1-102 through 18-1-106 and 18-1-112 through 18-1-114, MCA.

### *Options*

1. Repeal the Montana resident preferences and Montana-made preferences.
2. Leave the current statutory language as is.

### *Recommended Option*

The Department of Administration recommends the preliminary adoption of Option 1. The recommendation is predicated on the belief that the preferences are rarely helpful to Montana businesses in gaining state contracts, but are increasingly detrimental to them when pursuing business with other states.

Advantages
< Will allow Montana businesses to compete more effectively in other states
< Should result in minor efficiencies in contract award processes
< May result in minor decreases in state procurement costs

Disadvantages
< The impression of eliminating a perceived benefit for Montana business
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### *Committee Action*

*Discussion:* \_\_\_\_\_

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## ISSUES AND OPTIONS WORK SHEET

### ***Issue Description: Additional tools for procurements***

State law provides basically two methods for state procurements: (1) competitive sealed (low) bid; or (2) competitive sealed (request for) proposal. (Some exceptions apply for sole source, small purchases, exigencies, etc.) In some instances, the available procurement tools work awkwardly at best in purchasing items such as information technology supplies or services. New approaches to public contracting have been and continue to be developed in other states and the private sector, but are largely off limits to Montana procurement officials due to the statutory restrictions.

***Issue Source:*** Title 18, chapter 1, part 1, MCA (esp. 18-1-102, MCA); Title 18, chapter 4, part 3, MCA

### ***Options***

1. Expand the statutory list of available procurement tools to include such concepts as: "best value"; private sector partnerships; problem oriented proposals; "requests for quotation and qualifications"; the expansion of the sole source definition; and promotion of e-commerce.
2. Amend the statutory language to set broad state policy for procurement and require the Department of Administration to adopt rules detailing specific procurement methods to achieve the policy.
3. Authorize the Department of Administration to develop one or more pilot projects to test the efficacy of one or more alternative procurement methods.
4. Leave current statutory language as is.

### ***Recommended Option***

The Department of Administration recommends the preliminary adoption of Option 1. The recommendation is based on the belief that the evolution of procurement needs and expectations for state government has gone beyond the confines of existing statutory limitations. Procurement methods employed by other governmental jurisdictions and the private sector offer good alternatives.

Advantages
<ul style="list-style-type: none"><li>&lt; Should ensure the best return on expenditures for goods and services</li><li>&lt; Should allow for the most appropriate procurement method for individual procurement needs</li><li>&lt; May result in reduced costs or better goods/services, or both</li></ul>

Disadvantages
<ul style="list-style-type: none"><li>&lt; May require vendors and consumers, including taxpayers, to reorient perceptions away from lowest cost</li><li>&lt; May result in acrimony from vendors if unfairness is perceived</li><li>&lt; May result in higher short-term cost</li></ul>

### ***Committee Action***

***Discussion:*** \_\_\_\_\_

## ISSUES AND OPTIONS WORK SHEET

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## ISSUES AND OPTIONS WORK SHEET

**Issue Description: *Small business access to contracts*** Some small businesses perceive their access to state government contracts to be severely limited. The owners of these small businesses believe that if they are given equal access to state contracts they will be able to obtain some contracts due in part to the range, size, and variation in goods and services contracted for by the state and in part to a belief that Montana small business can compete (win) against anyone, particularly within certain niches.

**Issue Source:** Information received by the SAIC and others from Montana small business owners describing circumstances that indicate significant barriers to state contracts.

### ***Options***

1. Institute a program whereby: (a) state procurement officials would actively recruit Montana small businesses to participate in vendor lists; (b) Montana small businesses would have easy access to information on how to do business with the state; (c) Montana small business owners would be trained in the art and science of obtaining state government contracts; (d) a combination of alternatives (a) through (c) or others would be developed and implemented.
2. Legislatively impose new preferences requiring that a certain portion, e.g., 10% of the number or the dollar amount, of state contracts must be awarded to Montana small businesses. (This option would require a clear definition of both "Montana business" and "small business".)
3. Raise the threshold below which state procurements may be made without competitive bids and require that any state procurement under the threshold be awarded to a Montana small business. (This option would require a clear definition of both "Montana business" and "small business".)
4. Require state procurement officials to build a statistical database of bid/proposal solicitations and awards that could be used as a tool to gather insights into what (types, amounts, etc.) of contracts are awarded to whom (Montana, non-Montana, small, large, minority owned, etc.).
5. Take no action.

### ***Recommended Option***

There is no preliminary recommendation.

Advantages
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Disadvantages
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### ***Committee Action***

***Discussion:***

## **ISSUES AND OPTIONS WORK SHEET**

## ISSUES AND OPTIONS WORK SHEET

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*Issue Source* \_\_\_\_\_  
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*Options* \_\_\_\_\_  
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*Recommended Option* \_\_\_\_\_  
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Advantages

Disadvantages

*Committee Action*

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## ISSUES AND OPTIONS WORK SHEET

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## ISSUES AND OPTIONS WORK SHEET

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Advantages

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*Committee Action*

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A Discussion Tool for the SJR 9 Study of State Contracting

prepared for the  
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by Dave Bohyer, Research Director, Legislative Services Division

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Legislative Services Division

PO Box 201706

Helena, MT 59620-1706

PHONE: (406) 444-3064

FAX: (406) 444-3036

EMAIL: [leglsd@mt.gov](mailto:leglsd@mt.gov)

